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Supreme Court, U.S.
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No. 05-1659

IN THE

SUPREME COURT OF THE UNITED STATES

SOILA CAMACHO, SONIA DENISE GROVER, TEXAS WELFARE REFORM ORGANIZATION, EL PASO COUNTY HOSPITAL DISTRICT d/b/a R.E. Thomason General Hospital,

Petitioners,

v.

TEXAS WORKFORCE COMMISSION, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, AND TEXAS DEPARTMENT OF HUMAN SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in applying the nuanced approach required by prior decisions of this Court for determining whether the attorney's fees provision of the Texas Declaratory Judgment Act embodies a substantive state policy, correctly held that the discretionary fee-award provision of the statute does not reflect a substantive policy and therefore is procedural for *Erie* purposes.

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STATEMENT OF THE CASE

Petitioners brought a lawsuit against Respondents challenging rules adopted in 2003 by the Texas Workforce Commission which limited eligibility for Medicaid health coverage. These rules applied to adults with children who receive both cash assistance under the federal Temporary Assistance to Needy Families program and medical assistance under the federal Medicaid program.

Petitioners filed an original petition and application for declaratory relief, temporary injunctive relief, and a temporary restraining order in state court pursuant to Section 2001.038 of the Texas Administrative Procedure Act, TEXAS GOVERNMENT CODE § 2001.038, and the Texas Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.001, *et seq.* (Vernon 1997). The state district court issued a temporary restraining order that the parties agreed to extend until a state court ruling on the temporary injunction request. On January 12, 2004, Respondents removed this case to the federal district court for the Western District of Texas on the basis that the issue raised -- whether the challenged state rules were in compliance with federal law -- presented a federal question. Petitioners did not move to remand the case following removal. On June 10, 2004, the district court invalidated certain Texas Workforce Commission rules, and entered a final judgment in favor of Petitioners. The decision was affirmed on appeal.

Petitioners then filed an application under Fed. R. Civ. P. 54(d)(2) for attorney's fees in the district court, specifying the fee-award provision of TEX. CIV. PRAC. & REM. CODE § 37.009 of the Texas Declaratory Judgment Act as the statute entitling Petitioners to the award. Section 37.009 provides that "[i]n any proceeding" under that Act, the court "may" award such attorney's fees "as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. Petitioners argued that under principles of federalism

announced in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), and its progeny, the federal court was bound to apply the state statute.

On March 14, 2005, the district court denied the fee application. Pet. App. 12. The district court explained that a prevailing party is not entitled to recover fees, absent explicit statutory authority. Pet. App. 14. The court then held that the statutory authority upon which Petitioners based their request for fees -- the Texas Declaratory Judgment Act -- is a procedural state statute and "provides no substantive right recognizable in federal court." Pet. App. 14-15. The district court found the decisions of the Fifth Circuit in *Olander v. Compass Bank*, 363 F.3d 560 (5th Cir. 2004), and *Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208 (5th Cir. 1998) -- holding that the Texas Declaratory Judgment Act "is not substantive law" -- to be controlling precedent. 138 F.3d at 210. Pet. App. 14-15. Accordingly, the district court denied Petitioners' application for an award of attorney's fees.

On appeal, a unanimous panel of the Fifth Circuit affirmed the district court's ruling. The court of appeals held that Petitioners' claim for attorney's fees was foreclosed by the Fifth Circuit's prior precedent rule, because Fifth Circuit precedent directly on point -- *Utica*, and later *Olander* -- held that the Texas Declaratory Judgment Act is not substantive law. Pet. App. 2, 445 F.3d at 409. The court rejected Petitioners' argument that *Utica* is not binding because the *Utica* decision itself conflicted with earlier precedent of the Fifth Circuit. Petitioners also argued that *Utica* is inconsistent with *Erie* principles articulated in earlier Fifth Circuit decisions, and that *Utica's* analysis of the *Erie* issue was wrong in any event. Pet. App. 6-7, 445 F.3d at 411. The court of appeals noted that Petitioners failed to point to any decision prior to *Utica* that contradicted *Utica's* specific holding that the Texas Declaratory Judgment Act is procedural for *Erie* purposes. Pet. App. 6, 445 F.3d at 411.

The court of appeals also rejected Petitioners' argument that *Utica* conflicted with a prior Fifth Circuit decision, *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261 (5th Cir. 1997), holding that a different state attorney's fees law (not the Texas Declaratory Judgment Act) was substantive for *Erie* purposes. The court of appeals explained, first, that both *Ashland* and prior decisions of this Court recognize "that not all state attorney's fees laws are applicable in federal court under *Erie*," and that "[t]he Supreme Court has taken a nuanced approach in determining whether particular attorney's fees laws are procedural or substantive under *Erie*," and thus decisions such as *Ashland* "regarding a law not at issue here" did not undermine the specific holding in *Utica*. Pet. App. 7, 445 F.3d at 411.

Although the court of appeals held that it "need not go further to affirm the judgment of the district court," it went on "to explain why we believe *Utica*'s holding comports with general *Erie* principles." Pet. App. 7-8, 445 F.3d at 411-12. The court of appeals pointed out that the discretionary fee-award provision of the Texas Declaratory Judgment Act conflicts with the federal policy of the "American Rule" requiring parties ordinarily to bear their own attorney's fees, and that the Texas Declaratory Judgment Act discretionary fee-award provision "does not represent 'substantive policy'" of the State of Texas within the meaning of this Court's decision in *Chambers v. NASCO*, 501 U.S. 32, 51-52, 111 S. Ct. 2123 (1991). Pet. App. 8, 445 F.3d at 412. Accordingly, the court of appeals affirmed the district court's judgment that the Texas Declaratory Judgment Act is not substantive for *Erie* purposes. This petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

I. Petitioners Concede There Is No Conflict Among The Circuits And Improperly Ask This Court To Resolve An Essentially Fictitious Split Within The Fifth Circuit.

Petitioners do not point to any conflict among the federal circuits as to the question they believe is presented, which is itself unclear.[1] In fact, Petitioners acknowledge that no such conflict exists, and instead argue that conflicts between the circuits over "whether any particular state fee-shifting statute is substantive" are "unlikely," because federal litigation involving any given statute will normally occur only within the federal circuit that includes the state in question. Pet. at 24.

In the conceded absence of any split among the federal circuits, Petitioners attempt to argue that this Court should grant a writ of certiorari to resolve what they claim is an "internal split" among decisions within the Fifth Circuit. Pet. at 5, 24. Even if a true conflict did exist among decisions within the Fifth Circuit, Petitioners have plainly chosen the wrong procedure to seek a resolution of the

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[1] The petition vacillates as to the question Petitioners assert is presented. *Compare* Pet. at i ("Are discretionary state fee-shifting statutes substantive for *Erie* purposes?"), *with* Pet. at 11 ("The question presented in this case is whether a state fee-shifting statute is 'substantive fee shifting' for *Erie* purposes when the award it provides is part of the merits award, rather than a sanction for bad-faith litigation conduct."). Petitioners also misstate the Texas law in attempting to characterize a possible fee award as part of the "merits award," since it is clear that fee awards are entirely within the discretion of the trial court and are not even "dependent on a finding that a party 'substantially prevailed.'" *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996).

conflict. Petitioners should have sought resolution of the supposed conflict by seeking en banc review in the Fifth Circuit. That is the appropriate means by which to resolve a split within a circuit. *See* Fed. R. App. P. 35(a)(1) (providing that en banc hearing may be ordered when "necessary to secure or maintain uniformity of the court's decisions"). Petitioners did not seek en banc review.

This claim that a conflict exists is also overstated at best. It is true that the attorney's fee provision of the Texas Declaratory Judgment Act has been applied in two Fifth Circuit cases. *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595 (5th Cir. 2000); *In re Garza*, No. 03-40171, 2004 WL 249596 (5th Cir. Feb. 10, 2004).[2] However, in neither case did the Fifth Circuit make a specific holding that the fee-award provision of the Texas Declaratory Judgment Act is substantive for *Erie* purposes or offer any analysis of or citation to authority in support of applying the Texas Declaratory Judgment Act in federal court.

Instead, the opinions in those two cases reflect no more than that the parties apparently did not argue to the court of appeals that an *Erie* issue was presented with respect to the fee-award provision of the Texas Declaratory Judgment Act, and the panels did not address the *Erie* issue in those cases.

In the absence of a conflict among the circuits, or any reason why a supposed conflict among decisions within the Fifth Circuit should be resolved by this Court rather than a request for en banc consideration by the court of appeals, Petitioners are left only with the argument that there is a "compelling reason," Sup. Ct. R. 10, for this Court to address

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[2] The opinion in *Garza* is unpublished and therefore without precedential authority under Fifth Circuit local rule. *See* Fifth Circuit L. R. 47.5.4.

the status for *Erie* purposes of the discretionary attorney's fees provision of a single state statute, the Texas Declaratory Judgment Act. Plaintiffs point to no reason why this single statute is of such great importance as to meet that standard, and there is no such reason.

II. This Case Does Not Present An Appropriate Occasion For Consideration Of Any Question Relating To *Erie* Principles.

While no compelling reason exists to grant a writ of certiorari in this case, there is a strong reason for denying review. This case is a poor vehicle for consideration of any *Erie* question because the Fifth Circuit based its holding on the court's prior precedent rule. Under the Fifth Circuit's prior precedent rule, a panel is bound by circuit precedent unless a different result is unequivocally directed by controlling Supreme Court precedent. *See, e.g., Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001); *U.S. v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir. 1991); *Gandy v. Alabama*, 569 F.2d 1318, 1325 n.11 (5th Cir. 1978). In this case, the court of appeals found that Petitioners' claim for an award of attorney's fees was foreclosed by the court of appeals' prior decision in *Utica* holding that the Texas Declaratory Judgment Act is procedural for *Erie* purposes.[3] The court of appeals found that *Utica* was directly on point and Petitioners had failed to identify any prior decision that

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[3] Although two panels of the Fifth Circuit subsequent to *Utica* applied the Texas Declaratory Judgment Act in federal cases, the court found that neither of these decisions affected the precedential value of *Utica* even if they might be regarded as tacitly conflicting decisions (there was no *Erie* analysis of the attorney-fee provision of the Texas Declaratory Judgment Act in either case), because under the Fifth Circuit's prior precedent rule the earliest of conflicting panel decisions controls. Pet. App. 4, 445 F.3d at 410.

conflicts with *Utica's* specific holding. Pet. App. 7, 445 F.3d at 411. The court of appeals therefore affirmed the district court's decision on that ground.

Having done so, the court of appeals correctly stated that it "need not go further." Pet. App. 7, 445 F.3d 411. Because of the vigor of Petitioners' eagerness to re-argue the *Erie* issue, however, the court of appeals went on to explain why its prior decisions were consistent with "general *Erie* principles." Pet. App. 8, 445 F.3d at 412. The relatively brief discussion of *Erie* principles by the court of appeals was therefore in the nature of dicta not necessary for the resolution of the case. In light of the subsidiary importance of the court of appeals' discussion of *Erie* principles to the decision below, this case presents a poor vehicle for this Court's consideration of any *Erie* issue.

An additional consideration militating against review is the Petitioners' assertion that the *Erie* issue presented in this case is "a question of first impression." Pet. at 8. If that is true, then the Court should deny the writ of certiorari on that basis as well. The Court has long recognized the value of allowing legal issues to mature through the lower courts so that the Court may avail itself of the careful consideration of other courts before settling the matter, if necessary. *See, e.g., E. I. dePont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S. Ct. 965 (1977) (recognizing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals" prior to Supreme Court review); *U.S. v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568 (1984) (noting that Supreme Court review prior to multiple lower court consideration "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.").

III. The Court Of Appeals' *Erie* Analysis Was In Any Event Correct.

Although the court of appeals' discussion of general *Erie* principles was not necessary to decide the case, the court's analysis nevertheless is correct. The court correctly recognized that the Supreme Court has taken a "nuanced approach" in determining whether particular attorney's fees statutes are procedural or substantive under *Erie*. Pet. App. 7, 445 F.3d at 411. As stated in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991), the obligation of federal courts to apply state attorney-award rules "applies only to fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees." *Id.* at 52. Only where the fee-shifting provision is "part of a statutory liability which created a substantive right" should a federal court apply the state fee-shifting statute. *Id*. *See also, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31, 95 S. Ct. 1612 (1975) (application of state attorney's fees statute in federal court is limited to cases where the state statute "reflect[s] a substantial policy of the state"); *People of Sioux County v. Nat'l Sur. Co.*, 276 U.S. 238, 241, 48 S. Ct. 239 (1928) (Nebraska statute could be applied to award attorney's fees in a case removed to federal court because statute addressed "special classes of actions" in creating entitlement to recover attorney's fees by beneficiaries of insurance policies who bring actions to enforce obligations under an insurance policy, and thus embodied a substantive state policy to benefit specific category of litigants).

Applying these principles, the court of appeals correctly found that the Texas Declaratory Judgment Act attorney's fees provision did not embody any such "substantive policy." Pet. App. 8, 445 F.3d at 412. Fee awards are not limited to "certain classes of litigation," such as "actions to enforce an insurance policy." Pet. App. 9, 445

F.3d at 412, quoting *Chambers*, 501 U.S. at 52. To the contrary, the Texas Declaratory Judgment Act creates no substantive rights, but merely provides a "procedural device for deciding cases already within a court's jurisdiction." *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994). Moreover, the Texas Declaratory Judgment Act "does not tie fee awards to the outcome of litigation," or even require "a finding that a party 'substantially prevailed.'" Pet. App. 10, 445 F.3d at 412-13, quoting *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996).

The court's reasoning on this point is consistent with Supreme Court precedent holding that a proper *Erie* analysis inquires into whether a state rule is bound up with the rights and obligations created by state law and is so substantial a part of a state cause of action that application of the state rule in federal court is required to vindicate the state substantive right. *See, e.g., Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535-36, 78 S. Ct. 893 (1958). The discretionary fee-award provision of the Texas Declaratory Judgment Act is not bound up with any such state created substantive right, but rather merely makes fees available in some cases, on a discretionary basis, under a statute providing a procedural basis to bring an unlimited variety of actions already within the jurisdiction of the court.

In addition to correctly concluding that the Texas statute does not embody any "substantive policy" of the state, the court of appeals correctly found that the fee provision of the Texas Declaratory Judgment Act conflicts with federal policy, specifically the "American Rule" requiring parties ordinarily to bear their own attorney's fees, which is a rule that generally applies in federal court. Pet. App. 8, 445 F.3d at 412.

Petitioners erroneously attempt to argue that the "American rule" should be discounted because they assert it

is merely "a common law rule or practice," and therefore the rule can be modified by state legislatures and applied in cases in federal court unless and except to the extent Congress makes the American rule a matter of statutory law. Pet. at 13. In fact, Congress has made the American rule a matter of statutory federal law. The rule against awards of attorney's fees in federal court absent specific authorization under Fed. R. Civ. P. 54(d)(2)(B) or other federal law has been enacted into federal statutory law in the federal costs statute, 28 U.S.C. § 1920. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 255, 95 S. Ct. 1612 (1975) (explaining that "Congress has made specific provision for attorneys' fees under certain federal statutes, [but] it has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute."). In short, the federal rule against attorney's fees is statutory in nature, not a matter of common law, and therefore is controlling in cases in federal court absent a strong basis in *Erie* principles requiring its application of a rule embodying a contrary, substantive state policy.

In challenging the court of appeals' *Erie* analysis, Petitioners also claim that the court held that attorney's fees statutes are substantive if and only if awards are available to prevailing parties. Pet. at 6-8. This also mischaracterizes the decision of the court of appeals. The court's opinion does not adopt any such bright-line test. The court of appeals merely surveyed Fifth Circuit decisions following this Court's 1991 decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991), and observed that those cases found fee-shifting statutes limiting fee awards to prevailing parties to be substantive under *Erie*. Pet App. 9, 445 F.3d at 412. But the court explained that these decisions "reflect[] the more general policy concerns" underlying *Erie*, namely avoidance of forum shopping and inequitable administration of the laws. *Id.* The court of appeals did not purport to abandon that approach in its decision in this case. To the

contrary, it correctly recognized that a "nuanced approach" considering multiple factors is the proper approach for determining whether state attorney's fees laws are procedural or substantive under *Erie*. Pet. App. 7, 445 F.3d at 411.

CONCLUSION

The petition for a writ of certiorari should be denied.

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